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No. 770

In the Supreme Court of the United States

October Term, 1943.

FANNIE E. WILLIAMS, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Your petitioner above named respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above cause on November 3, 1943, reversing the judgment of the United States District Court for the Northern District of Oklahoma, in an action to quiet title to lands situate in Delaware County, State of Oklahoma.

Opinions Below.

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 39) is reported as *United States of America* v. *Fannie E. Williams,* 139 F. (2d) 83.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered November 3, 1943 (R. 44). A petition for rehearing was presented and filed within the time provided by Rule 24 of the rules promulgated by the Honorable Circuit Court of Appeals for the Tenth Circuit (R. 47). The petition for rehearing was overruled on December 13, 1943 (R. 53).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement.

The involved land was purchased on July 16, 1919, for William Bushyhead, a full-blood Cherokee Indian, enrolled opposite Roll No. 17669, with funds held in trust by the United States of America for his benefit; which funds were derived from oil royalties from restricted lands allotted to the said William Bushyhead by virtue of his enrollment as a full-blood citizen of the Cherokee Nation or Tribe (R. 19-20).

The deed conveying such property to the said William Bushyhead was a special form of deed, commonly known as the Carney-Lacher form, which provided that said land was not subject to lease, deed, mortgage, power of attorney, contract of sale, or other instrument affecting said land prior to April 26, 1931, unless made with the consent of and approved by the Secretary of the Interior (R. 20).[1]

1. The habendum clause of the deed is as follows (R. 35):

"To have and to hold said described premises unto the said grantee his heirs and assigns forever, free and clear and discharged of all former grants charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature, subject to the conditions that no lease deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification unless made with the consent of and approved by the Secretary of the Interior."

On March 21, 1934, William Bushyhead, joined by his wife, executed a warranty deed purporting to convey said lands to F. M. Hartley. Thereafter the interest, if any, acquired by Hartley passed by mesne conveyances to the petitioner herein (R. 20-21).

William Bushyhead died intestate on October 16, 1935, leaving his wife, Callie Bushyhead, and five sons surviving as his sole and only heirs, all of whom are full-blood Cherokee Indians (R. 20).

On December 17, 1941, the petitioner filed the present action in the District Court of Delaware County, State of Oklahoma, to obtain a judicial determination of the heirship of said William Bushyhead, deceased, and to quiet her title to such lands against the known and unknown heirs of said decedent (R. 5-11). Notice of the pendency of the action was given to the Superintendent of the Five Civilized Tribes, pursuant to the provisions of Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 239, and, at the instance of the United States, the cause was removed to the District Court of the United States for the Northern District Court of Oklahoma (R. 19).

After removal the United States filed a complaint in intervention, alleging, in substance, that the restrictions imposed in such deed were extended for a period of twenty-five years from and after April 26, 1931, by the provisions of Section 1 of the Act of Congress of May 10, 1928, 45 Stat. 495 (R. 11-15).

The District Court held, in substance, that the provisions of the Act of Congress of May 10, 1928, did not impose any additional restrictions upon the involved land, and that from and after April 26, 1931, the said William Bushyhead, as the owner of such lands, was competent to sell the same, and to convey a fee simple title free of any restrictions. Findings of fact and conclusions of law (R.

28-33) and a decree quieting petitioner's title to said lands (R. 33) were accordingly entered. On November 3, 1943, the Circuit Court of Appeals reversed the judgment of the trial court (R. 44). Petition for rehearing was duly filed (R. 47). It was overruled on December 13, 1943 (R. 53).

Question Presented.

Whether the provisions of Section 1 of the Act of Congress of May 10, 1928, 45 Stat. 495, extended the restrictions against alienation imposed upon lands purchased by the Secretray of the Interior with restricted funds of an individual Indian, where by the terms of the deed of conveyance the Indian grantee is restrained from alienating said land prior to April 26, 1931.

Statute Involved.

Section 1 of the Act of May 10, 1928, 45 Stat. 495, provides:[2]

> "That the restrictions against the alienation, lease, mortgage, or other encumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as one-half or more Indian blood, be, and they are hereby, extended for an additional period of twenty-five years commencing on April 26, 1931: *Provided*, That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Reasons for Granting the Writ.

1. The decision below conflicts with *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, 63 S. Ct. 1284, 87 L. ed. 1233.

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2. Kappler, Indian Affairs, Laws and Treaties, Vol. V, p. 44.

The decision below is predicated upon the holding, in effect, that the royalties derived from the sale of oil and gas from the restricted allotment of William Bushyhead were impressed with the same trust as the lands from which they were derived; and that since the involved land was acquired with funds derived from a restricted allotment, said land constitutes "lands allotted to members of the Five Civilized Tribes," as that phrase is used in Section 1 of the Act of May 10, 1928.

In the *Oklahoma Tax Commission* case this Court reviewed at length the legislative history of the Act of Congress of January 27, 1933, 47 Stat. 777,[3] and expressly held that the restrictions upon oil royalties derived from a restricted allotment were extended by the provisions of Section 1 of that Act.[4] This decision was completely overlooked by the Honorable Circuit Court of Appeals.

2. The decision below conflicts with *Board of County Commissioners of Creek County* v. *Seber*, 318 U. S. 705, 63

3. Kappler, Indian Affairs, Laws and Treaties, Vol. V, p. 298.

4. Section 1 of the Act of Congress of January 27, 1933, provides, in part:

"That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, * * *; Provided, That where the entire interest in any tract of restricted tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in meantime in the manner provided by law: * * *."

It is evident that the involved lands are neither "funds" or "other securities" as those terms are employed in the 1933 Act. It is likewise evident that the involved lands do not fall within the terms of the quoted proviso, for the reason that lands of this class were not tax-exempt prior to the adoption of the Act of Congress of June 20, 1936, 49 Stat. 1542. Shaw v. Oil Corp., 276 U. S. 575, 48 S. Ct. 333, 72 L. ed. 709; Seber v. Board of Commissioners, 318 U. S. 705, 63 S. Ct. 920, 87 L. ed. 807.

S. Ct. 920, 87 L. ed. 807,[5] in which case the court, in construing the Act of June 20, 1936, 49 Stat. 1542,[6] as amended by the Act of May 19, 1937, 50 Stat. 188,[7] providing a tax immunity for lands acquired with restricted funds of individual Indians, expressly held that the restrictions and tax-exemption upon such lands will not expire on April 26, 1956, the date upon which restrictions expire upon allotted lands under the provisions of Section 1 of the Act of May 10, 1928.

The effect of this decision is, in substance, that lands purchased with restricted funds are not "lands allotted to members of the Five Civilized Tribes,"[8] as was held by the Honorable Circuit Court of Appeals in the instant case.

3. The language of the involved statute is perspicuous. It is so clear and free of ambiguity that nothing is left for judicial construction. The term "allotted lands" has a definite and well understood meaning,[9] and it is evident that Congress employed this term in its usual and ordinary sense. The obvious, palpable meaning of the words of the statute may not be disregarded because of the dependent character of the Indian.[10]

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5. The restrictive clause in the deed involved in that case had no definite time limitation.

6. 25 U. S. C. A., Section 412.

7. 25 U. S. C. A., Section 412 (a).

8. In the opinion this Court said (87 L. ed. 811):

> "It has been suggested that the tax exemption granted by the 1937 Act is personal to the Indian whose restricted funds were used to purchase the land or else that it extends to the land in the hands of restricted Creek Indian grantees only until 1956, consonantly with the statutes governing the tax status of restricted allotted lands of the Creeks. The Act does not say, however, and there is not a word to suggest that upon transfer of the lands to Indian heirs or grantees, subject to restrictions, the exemption is either to terminate or else extend only until 1956. If Congress had intended either result, it could easily have expressed those purposes."

9. Stewart v. Keyes, 295 U. S. 403, 411, 55 S. Ct. 807, 79 L. ed. 1507.

10. United States v. Choctaw Nation, 179 U. S. 494, 21 S. Ct. 149, 164, 45 L. ed. 291.

A consideration of the legislative history of this Act lends support to our claimed construction.[11]

If, however, there be any doubt as to the proper interpretation to be given to this Act, all doubt is removed by a consideration of the provisions of the Act of June 20, 1936, 49 Stat. 1542, and the amendatory Act of May 19, 1937, 50 Stat. 188.[12]

These statutes should be considered in determining the intent of Congress in the passage of the statute here in question, if there be any doubt as to the legislative intent or the proper interpretation to be given to that Act.[13]

4. The decision below conflicts with *United States* v. *Watashe,* 21 Fed. Supp. 903, wherein the identical question here presented was decided by the United States District Court for the Northern District of Oklahoma on January 25, 1938. It was held that restrictions upon the class of land involved in this case were not extended by the Act in question. This judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit on March 13, 1939 (102 F. (2d) 428).

The decision of the District Court in the *Watashe* case

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11. S. Rep. No. 982, 70th Congress, 1st Sess. See also Hearings before Committee of Indian Affairs, H. Rep., 70th Congress, 1st Sess., on H. R. 12,000.

12. Each of these statutes provided a tax immunity for land purchased with restricted funds of individual Indians "until otherwise directed by Congress." It is evident that Congress did not consider such lands to be allotted lands, otherwise it would have made provision for such tax immunity to terminate on April 26, 1956, the date on which restrictions will expire on allotted lands under the terms of the involved statute. See Board of County Commissioners v. Seber, 318 U. S. 705, 63 S. Ct. 920, 87 L. ed. 807.

It is to be observed that Congress by Section 4 of the Act of May 10, 1928, makes provision for tax-exemption for allotted, inherited and devised restricted land of members of the Five Civilized Tribes. It did not include lands of the class involved herein. If it had, no necessity would have existed for the enactment of the 1936 and 1937 Acts. Section 4 of the Act of May 10, 1928, is set forth in full in the appendix of this petition.

13. Tiger v. Western Investment Co., 221 U. S. 286, 31 S. Ct. 578, 55 L. ed. 738; Bowling v. United States, 233 U. S. 528, 34 S. Ct. 659, 58 L. ed. 1080

has governed the transfers of real estate for more than five years. The decision below disturbs numerous titles in the eastern part of the State of Oklahoma.

The decision of the District Court in the *Watashe* case has become a rule of property. It should not be overturned even though such construction were open to doubt. *Truskett* v. *Closser,* 236 U. S. 223, 35 S. Ct. 385, 59 L. ed. 549.

Conclusion.

Wherefore, for each of the reasons above stated, petitioner respectfully submits that this petition for a writ of *certiorari* should be granted.

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